

1 TEAGUE P. PATERSON, SBN 226659
2 VISHTASP M. SOROUSHIAN, SBN 278895
3 **BEESON, TAYER & BODINE, APC**
4 483 Ninth Street, 2nd Floor
5 Oakland, CA 94607
6 Telephone: (510) 625-9700
7 Facsimile: (510) 625-8275
8 Email: tpaterson@beesontayer.com
9 vsoroushian@beesontayer.com

10 Attorneys for Plaintiff
11 *AFSCME LOCAL 101*

12
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SANTA CLARA**
15 **AT SAN JOSÉ**

16 SAN JOSE POLICE OFFICERS'
17 ASSOCIATION,

18 Plaintiff,

19 v.

20 CITY OF SAN JOSÉ, BOARD OF
21 ADMINISTRATION FOR POLICE AND FIRE
22 DEPARTMENT RETIREMENT PLAN OF
23 CITY OF SAN JOSE, and DOES 1-10,
24 inclusive,

25 Defendants.

Consolidated Case No. 1-12-CV-225926

[Consolidated with Case Nos. 1-12-CV-225928,
1-12-CV-226570, 1-12-CV-226574,
1-12-CV-227864, and 1-12-CV-233660]

ASSIGNED FOR ALL PURPOSES TO:
JUDGE PATRICIA LUCAS
DEPARTMENT 2

**PLAINTIFF/PETITIONER AFSCME
LOCAL 101's RESPONSE TO CITY OF
SAN JOSÉ'S REQUEST FOR DIFFERENT
STATEMENT OF DECISION PURSUANT
TO RULE 3.1590(D)**

26 AND RELATED CROSS-COMPLAINT AND
27 CONSOLIDATED ACTIONS

28 Pursuant to California Rule of Court, Rule 3.1590, AFSCME Local 101 ("AFSCME")
submits its response to the City of San José's ("City") Request for Different Statement of Decision
("Request"). In doing so, AFSCME joins the responses to the City's Request submitted by co-

1 plaintiffs San Jose Police Officers' Association on January 21, 2014, and co-plaintiffs Sapien et al. on
2 January 17, 2014.

3 Furthermore, in the main, Defendant City of San Jose's Request for a Different Statement of
4 Decision and Proposals Not in Tentative Statement to Clarify Three Issues ("City's Request")
5 impermissibly requests the court to (1) re-draft a voter-enacted statute, (2) issue an advisory opinion,
6 and (3) offer rulings on matters not at issue or implicated by Measure B.

7 The City asks the Court to find that Measure B permits imposition of a one to one ratio for
8 retiree health funding and seeks a ruling that the City is "not currently in violation of any
9 requirement" regarding the 'lowest' cost retiree health medical plan. In so doing, the City asks the
10 Court to re-write the Measure B. As stated in *People's Advocate, Inc. v. Superior Court* (1986) 181
11 Cal.App.3d 316, 330:

12 A corollary to the grammatical test, rooted in limitations upon the judicial power (see,
13 e.g., Code Civ.Proc. § 1858), is the fundamental principle that a court may not rewrite a
14 statute to save its constitutionality. A court has no power to produce "a judicially
15 reformed statute," one which is made constitutional only "by inserting qualifications and
16 exceptions in the statutory language, ..." (In re Blaney, supra, 30 Cal.2d at p. 655, 184
17 P.2d 892; Mulkey v. Reitman (1966) 64 Cal.2d 529, 544, 50 Cal.Rptr. 881, 413 P.2d 825;
18 see also French v. Teschemaker (1864) 24 Cal. 518, 554; People v. Perry (1889) 79 Cal.
19 105, 114–115; Estate of Mahoney (1901) 133 Cal. 180, 182, 65 P. 389; City of Los
20 Angeles v. Lewis (1917) 175 Cal. 777, 780–784, 167 P. 390; Mordecai v. Board of
21 Supervisors (1920) 183 Cal. 434, 442–446, 192 P. 40; Seaboard Acceptance Corp. v.
22 Shay (1931) 214 Cal. 361, 365–367, 5 P.2d 882.) A severability clause cannot change
23 this rule. A severability statute may not be used "to delegate to the courts the task of
24 rewriting the statute, ..." (In re Blaney, supra, at p. 655, 184 P.2d 892.)
25 [Emphasis added].

26 Also, Code of Civil Procedure section 1858 states:

27 "In the construction of a statute or instrument, the office of the Judge is simply to
28 ascertain and declare what is in terms or in substance contained therein, not to insert what
has been omitted, or to omit what has been inserted; and where there are several
provisions or particulars, such a construction is, if possible, to be adopted as will give
effect to all."

29 The City also requests the Court to issue an advisory ruling with respect to retiree health care,
30 requesting the court to insert the words: "to the extent the City does not make the lowest cost plan
31 available to all members or survivors of the Federated Plan, Section 1512-A(c) violates..." (emphasis
32 original). AFSCME respectfully suggests that the City's request on this point seeks an advisory
33 ruling with respect to what it can or cannot do. It essentially seeks an advance as-applied ruling,

1 which would be advisory in nature. A sufficient factual record has not been established on the
2 particular issue to pre-authorize City action, and so the City seeks to adjudicate what has not been put
3 before the Court.

4 AFSCME also respectfully suggests that the portion of the City's Request that seeks a
5 "rul[ing] that employees can be requires to pay for retiree healthcare unfunded liabilities up to a one
6 to one ratio with the City" similarly seeks an advisory ruling, and is not an issue presented or raised
7 with respect to Measure B.

8
9
10
11 Dated: January 21, 2014

BEESON, TAYER & BODINE, APC

12
13 By:



VISHTASP M. SOROUSHIAN
TEAGUE P. PATERSON
Attorneys for AFSCME LOCAL 101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

**AFSCME LOCAL 101'S RESPONSE TO CITY'S REQUEST FOR DIFFERENT
STATEMENT OF DECISION**

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ **By Personally Delivering** a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ **By Messenger Service** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure § 1011, by placing a true and correct copy thereof in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service.

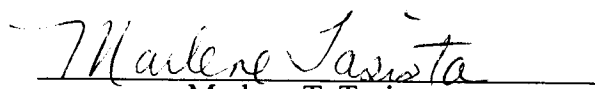
☐ **By UPS Overnight Delivery** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ **By Facsimile Transmission** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, January 21, 2014.


Marlene T. Tasista

SERVICE LIST

Greg McLean Adam, Esq.
Jonathan Yank, Esq.
Gonzalo C. Martinez, Esq.
Amber L. West, Esq.
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104

*Attorneys for Plaintiff, SAN JOSE POLICE
OFFICERS' ASSOCIATION (Santa Clara
Superior Court Case No. 112CV225926)*

Arthur A. Hartinger, Esq.
Geoffrey Spellberg, Esq.
Linda M. Ross, Esq.
Jennifer L. Nock, Esq.
Michael C. Hughes, Esq.
MEYERS, NAVE, RIBACK, SILVER &
WILSON
555 12th Street, Suite 1500
Oakland, CA 94607

*Attorneys for Defendants, THE CITY OF SAN
JOSE AND DEBRA FIGONE*

John McBride, Esq.
Christopher E. Platten, Esq.
Mark S. Renner, Esq.
WYLIE, McBRIDE, PLATTEN & RENNER
2125 Canoas Garden Avenue, Suite 120
San Jose, CA 95125

*Attorneys for Plaintiffs/Petitioners, ROBERT
SAPIEN, MARY McCARTHY, THANH HO,
RANDY SEKANY AND KEN HEREDIA (Santa
Clara Superior Court Case No. 112-CV-225928)*

AND

*Plaintiffs/Petitioners, JOHN MUKHAR, DALE
DAPP, JAMES ATKINS, WILLIAM
BUFFINGTON AND KIRK PENNINGTON (Santa
Clara Superior Court Case No. 112-CV-226574)*

AND

*Plaintiffs/Petitioners, TERESA HARRIS, JON
REGER, MOSES SERRANO (Santa Clara
Superior Court Case No. 112-CV-226570)*

Harvey L. Leiderman, Esq.
REED SMITH, LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

*Attorneys for Defendant, CITY OF SAN JOSE,
BOARD OF ADMINISTRATION FOR POLICE
AND FIRE DEPARTMENT RETIREMENT
PLAN OF CITY OF SAN JOSE (Santa Clara
Superior Court Case No. 112CV225926)*

AND

*Necessary Party in Interest, THE BOARD OF
ADMINISTRATION FOR THE 1961 SAN JOSE
POLICE AND FIRE DEPARTMENT
RETIREMENT PLAN (Santa Clara Superior
Court Case No. 112CV225928)*

AND

*Necessary Party in Interest, THE BOARD OF
ADMINISTRATION FOR THE 1975
FEDERATED CITY EMPLOYEES'
RETIREMENT PLAN (Santa Clara Superior
Court Case Nos. 112CV226570 and
112CV22574)*

AND

*Necessary Party in Interest, THE BOARD OF
ADMINISTRATION FOR THE FEDERATED
CITY EMPLOYEES RETIREMENT PLAN
(Santa Clara Superior Court Case No.
112CV227864)*

1 Stephen H. Silver, Esq.
2 Richard A. Levine, Esq.
3 Jacob A. Kalinski, Esq.
4 SILVER, HADDEN, SILVER, WEXLER &
5 LEVINE
6 1428 Second Street, Suite 200
7 Santa Monica, CA 90401-2367
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
*Attorneys for Plaintiffs, SAN JOSE RETIRED
EMPLOYEES ASSOCIATION, HOWARD E.
FLEMING, DONALD S. MACRAE, FRANCES J.
OLSON, GARY J. RICHERT and ROSALINDA
NAVARRO (Santa Clara Superior Court Case No.
112CV233660)*